FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 11 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC., AND
SECOND OCEANIC CORPORATION,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR THE APPELLANT

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
JAMES E. KULP
Deputy Attorneys General

JAMES E. MOORE
Assistant Attorney General

Supreme Court–State Library Building
1101 East Broad Street
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

ARGUMENT 1

I. Virginia Code Sections 28.1-60 And 28.1-81.1 Are Not Preempted By The Bartlett Act, Federal Vessel Enrollment And Licensing Statutes, Or Any Comprehensive Federal Legislative Scheme Nor Do The Virginia Statutes Intrude Upon The Federal Authority In Foreign Affairs. 1

A. The Bartlett Act (16 U.S.C. § 1081, *et seq.*) Does Not Preempt State Jurisdiction To License Fishing By Vessels Of The United States Within The Territorial Sea. 1

B. Federal Vessel Enrollment And Licensing Statutes (46 U.S.C. §§ 251, 263) Do Not Preempt Virginia Code Sections 28.1-60 And 28.1-81.1. 2

C. There Is No Comprehensive Federal Legislative Scheme That Would Preempt Virginia Code Section 28.1-81.1. 8

D. Virginia Code Section 28.1-81.1 Does Not Intrude Upon The Federal Authority In Foreign Affairs. 14

II. Virginia Code Section 28.1-60 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws. Virginia Code Section 28.1-60 Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Is Therefore Permissible Under The Fourteenth Amendment. .. 15

A. The Appellees are Foreign-Controlled Corporations And As Such Are Not Entitled To Claim Benefits Of The Equal Protection Clause Of The Fourteenth Amendment. .. 15

B. Virginia Code Section 28.1-60 Limiting The Taking Of Menhaden In The Chesapeake Bay To Resident Corporations Is Reasonably Related To Fisheries Conservation And Is Therefore Permissible Under The Fourteenth Amendment. 17

Page

III. Virginia Code Section 28.1-81.1 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws And In Any Event The Statute Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Is Therefore Permissible Under The Fourteenth Amendment. 22

A. Virginia Code Section 28.1-81.1 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws. 23

B. Virginia Code Section 28.1-81.1 Excluding Foreign-Controlled Corporations Does Not Establish A "Suspect Classification." 23

C. Virginia Code Section 28.1-81.1 Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Therefore Is Permissible Under The Fourteenth Amendment. 24

IV. Virginia Code Sections 28.1-60 And 28.1-81.1 Do Not Violate The Commerce Clause Since They Neither Regulate Nor Unduly Burden Interstate Commerce. 29

CONCLUSION 33

CERTIFICATE OF SERVICE 36

TABLE OF CITATIONS

Cases

Baldwin v. Seelig, 294 U.S. 511 (1935) 30

Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936) 33

California v. Thompson, 313 U.S. 109 (1941) 33

Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 22

Dandridge v. Williams, 397 U.S. 471 (1970) 18, 21, 22, 28

Page

Dunn v. Blumstein, 405 U.S. 330 (1972) 18

Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)..29, 30, 31

Geer v. Connecticut, 161 U.S. 519 (1896) 6

Gibbons v. Ogden, 9 Wheat. 1 (1824) 3, 4

Graham v. Richardson, 403 U.S. 365 (1971) 23

Grosjean v. American Press Co., 297 U.S. 233 (1936) 15

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 5

H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 30

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 2, 6, 8, 13

In re Griffiths, 413 U.S. 717 (1973) 23

Jordan v. Tashiro, 278 U.S. 123 (1928) 24

Kelly v. Washington, 302 U.S. 1 (1937) 8

Manchester v. Massachusetts, 139 U.S. 240 (1891) 3, 4, 6, 7

McCready v. Virginia, 94 U.S. 391 (1877) 5, 6, 7, 21

McGowan v. Maryland, 366 U.S. 420 (1961) 18, 20, 22, 24, 27

Minnesota Rate Cases, 230 U.S. 352 (1913) 32, 33

Mintz v. Baldwin, 289 U.S. 346 (1933) 8

Missouri v. Holland, 252 U.S. 416 (1920) 19

Nippert v. Richmond, 327 U.S. 416 (1945) 30, 31

Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 29, 30

Parker v. Brown, 317 U.S. 341 (1943) 31

Pennsylvania v. West Virginia, 226 U.S. 553 (1923) 29

Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888) 15, 16

Reed v. Reed, 404 U.S. 71 (1971) 18

Reid v. Colorado, 187 U.S. 137 (1902) 8

Page

Savage v. Jones, 225 U.S. 501 (1912) 8

Skiriotes v. Florida, 313 U.S. 69 (1941) 8, 26

Smith v. Maryland, 18 How. 71 (1855) 3

Sosna v. Iowa, 419 U.S. 393 (1975) 18

South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) 32, 33

State of Alaska v. Arctic Maid, 366 U.S. 199 (1961) 4, 29

Sugarman v. Dougall, 413 U.S. 634 (1973) 23

Toomer v. Witsell, 334 U.S. 385 (1948) 4, 17, 18, 19, 20, 21, 29

Truax v. Raich, 239 U.S. 33 (1915) 22

United States v. California, 332 U.S. 19 (1947) 18, 20, 21

United States v. Pink, 315 U.S. 203 (1942) 15

Wickard v. Filburn, 317 U.S. 111 (1942) 5

Wiggins Ferry Co. v. City of East St. Louis, 107 U.S. 365 (1882) .. 4

Zschernig v. Miller, 389 U.S. 429 (1968) 14

Statutes

Code of Virginia (1950), as amended:

Section 28.1-58 .....17, 18

Section 28.1-60 .....1, 2, 15, 17, 20, 22, 29, 30, 33, 34, 35

Section 28.1-65 18

Section 28.1-81.1 .....1, 2, 8, 9, 10, 13, 14, 15, 22, 23, 24, 25, 26, 28, 29, 30, 31, 33, 34, 35

United States Code:

Title 16, Section 1081 .....2, 8, 13

Title 16, Section 1801 et seq. 8, 15

Title 43, Section 1301 et seq. 19

Title 46, Section 11 .....9, 14

Page

Title 46, Section 251 .....2, 7

Title 46, Section 252 .....8, 9, 14

Title 46, Section 263 .....2, 7, 9

Title 46, Section 808 .....8, 10, 11, 12, 14

Title 46, Section 835 .....8, 10, 11, 12, 14

Other Authorities

House of Representatives, Hearing Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, 94th Congress, "Two Hundred Mile Fisheries Zone and Joint Ventures," Committee Serial No. 94-44 (Sept. 8, 1976) 11

United States Constitution:

Article I, § 8 34

Amendment XIV, § 1 .....15, 16, 17

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC., AND
SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR THE APPELLANT

ARGUMENT

I.

Virginia Code Sections 28.1-60 And 28.1-81.1 Are Not Preempted By The Bartlett Act, Federal Vessel Enrollment And Licensing Statutes, Or Any Comprehensive Federal Legislative Scheme Nor Do The Virginia Statutes Intrude Upon The Federal Authority In Foreign Affairs.

A. THE BARTLETT ACT DOES NOT PREEMPT STATE JURISDICTION TO LICENSE FISHING BY VESSELS OF THE UNITED STATES WITHIN THE TERRITORIAL SEA.

The three judge federal court below held that Virginia Code Section 28.1-81.1 had been preempted by the Bartlett Act. (16 U.S.C. § 1081 *et seq.*) The Court stated that "in

our judgment, this legislation [16 U.S.C. § 1081 *et seq.*] preempted Virginia's control of commercial sea fisheries and superseded the state's regulation of them." Virginia, as well as Delaware, Maryland, New York, Maine, New Hampshire, Rhode Island and Massachusetts, strongly contest this view. The United States, in its brief requested by this Court, also disagrees with the lower court as to this matter. The Bartlett Act clearly applies only to *foreign flag vessels,* prohibiting their fishing within the United States exclusive fishery zone, formerly 12 miles, now extended to 200 miles. Since the Virginia statutes involved here are applied to *United States flag vessels,* the Bartlett Act in no way preempts their operation. *Huron-Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960). Even the Appellees (Seacoast), no longer contend that the Bartlett Act alone preempts the power of states to license fishing in state territorial waters. The lower court should therefore be reversed as to this point.

Although it was not addressed in the opinion of the lower court from which this appeal was taken, Seacoast would now have this Court consider a preemption argument relying on two new theories, which will be treated in the following paragraphs B and C.

B. Federal Vessel Enrollment And Licensing Statutes (46 U.S.C. §§ 251, 263) Do Not Preempt Virginia Code Sections 28.1-60 And 28.1-81.1.

Seacoast contends that by virtue of the enrollment and licensing of its vessels as United States vessels, under 46 U.S.C. §§ 251 and 263, they are authorized to take fish in the waters of any state, and that Virginia Code §§ 28.1-60 and 28.1-81.1, which would prevent Seacoast's harvesting of fish from Virginia waters, are preempted by force of the

federal enrollment and licensing statutes. The United States, in its Brief, has taken essentially the same position.

This Court has on several occasions firmly rejected the notion that federal enrollment and licensing of fishing vessels preempts operation of state fisheries laws against vessels so licensed. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Smith* v. *Maryland,* 18 How. 71 (1855). The holdings of this Court in *Manchester* and *Smith* leave no doubt that issuance of a federal license has no effect upon application of state fisheries laws to federally licensed vessels. But Seacoast and the United States attempt to distinguish these holdings, asserting that the state laws in *Manchester* and *Smith* did not exclude federally licensed vessels from state fisheries, but instead, merely regulated the manner and means of their taking fish. It is the complete exclusion of federally licensed vessels from state fisheries which is, according to Seacoast and the United States, preempted by issuance of a federal license. The federal license, Seacoast contends, authorizes the taking of fish in the navigable waters of every state, which authorization no state can negate by its laws. The clear holdings in *Manchester* and *Smith,* however, do not support this contention.

Seacoast has attempted to frame the issue as if the Virginia statutes preclude federally licensed vessels from its waters, thus permitting an argument based upon *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). The Virginia statutes being challenged by Seacoast in fact do not exclude any vessels. The right to navigate is unimpaired. Similarly, the right to transport fish or otherwise engage in commerce is unaffected by the Virginia statutes, which relate solely to the taking of fish. Nevertheless, Seacoast and the United States rely upon *Gibbons* for support of their theory that issuance of a federal license confers the right to take fish from state waters and thereby preempts laws such as the

Virginia statutes in question. Examination of the holding in *Gibbons,* however, admits of no such conclusion. In *Gibbons* it was decided that commerce necessarily included navigation in state waters. Following upon that premise, Chief Justice Marshall concluded that issuance of a *license for the coasting trade,* unquestionably a part of commerce, implied an affirmative right to navigate through state waters. Seacoast and the United States contend that, simply because fishing vessels are licensed under the same statute as vessels licensed for the coasting trade, the license for the fisheries must confer a right to take fish in state waters just as the coasting trade license conferred a right to navigate state waters. The syllogism is appealing, but it has no foundation in law.

It was acknowledged in *Gibbons* that whatever rights or authority the federal license could confer must be derived from the power of Congress over commerce. The federal statutes for enrollment and licensing of vessels are clearly founded upon the authority of Congress to regulate commerce. *Wiggins Ferry Co.* v. *City of East St. Louis,* 107 U.S. 365 (1882). Thus, after finding that commerce, including the coasting trade, necessarily included navigation in state waters, it is not surprising that Chief Justice Marshall would conclude that a license for the coasting trade implied authority to navigate state waters. But this Court has never viewed the taking of fish in state waters as a part of interstate commerce. *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). Accordingly, in view of the settled conclusion that commerce does not include taking of fish in state waters, it is not at all logical to contend, as Seacoast and the United States do, that a license authorized by Congress under its commerce authority confers a right to take fish from state waters.

The United States and Seacoast, however, cite *Wickard* v. *Filburn,* 317 U.S. 111, 125 (1942) and *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964), respectively, noting that the power of Congress over commerce reaches broadly and may, in fact, reach local activities which are not themselves a part of interstate commerce but which affect commerce. The question here being preemption, the nub of the issue is whether the federal enactment was *intended* to confer a right to take fish in state waters and preempt state laws to the contrary.

To contend that in 1792-1793 Congress intended, by enactment of the federal vessel enrollment and licensing laws, to confer upon owners of fishing vessels licensed under federal laws a right to take fish from state waters, state laws to the contrary notwithstanding, is to ignore completely the circumstances and history surrounding passage of the federal licensing and enrollment statutes. In *McCready* v. *Virginia,* 94 U.S. 391 (1877) this Court expressed the view that:

> "The principle has long been settled in this Court, that each State owns the beds of all tide-waters within its jurisdiction unless they have been granted away. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Smith* v. *Maryland,* 18 How. 74; *Munford* v. *Wardwell,* 6 Wall. 436; *Weber* v. *Harbor Commissioners,* 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell,* 16 Pet. 410. *The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its*

> *tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.*" 94 U.S. 391, 394, 395 (Emphasis added).

The established view expressed in *McCready* was, therefore, that the states owned and controlled exclusively their tidal waters and the fisheries therein, subject only to the authority of Congress over *navigation*.

The same view was quoted with unqualified approval by this Court in *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891) in respect to the menhaden fishery of Buzzard's Bay. And in *Geer* v. *Connecticut,* 161 U.S. 519 (1896), this Court spoke of the property rights of the state in game and fish and the right of the state to "withhold or grant" the privilege of taking such resources. 161 U.S. 533.

It is, therefore, evident that in 1792-1793 when the federal vessel enrollment and licensing statutes were enacted, Congress and this Court viewed the game and fisheries within the jurisdiction of the states as property of the states under their exclusive control. The privilege of taking such resources was entirely within the discretion of the states.

The contention by Seacoast and the United States that the 1792 and 1793 enactments conferred upon owners of fishing vessels licensed thereunder the right to take fish from state territorial waters, thereby superseding state laws limiting access thereto, is in direct contradiction with the view expressed in *McCready* and other cases holding that the states owned and exclusively controlled the fisheries within their boundaries.

Preemption is not to be lightly inferred, but is implied only when the act of Congress, fairly interpreted, is in actual conflict with the law of a state. *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1960). The federal

enrollment and licensing statutes, 46 U.S.C. §§ 251 and 263, fairly interpreted in light of the history surrounding their enactment, are not in conflict with Virginia Code §§ 28.1-60 and 28.1-81.1. Interpreted in light of the commonly held notions regarding state ownership and control of fisheries in 1792-1793, as expressed in *McCready, Manchester,* and *Geer,* the federal enactments cannot be reasonably interpreted to confer upon federally licensed vessels a right to take fish from state waters. The federal enrollment and licensing laws, therefore, do not come into actual conflict with the Virginia laws which limit the right to harvest state fisheries.

Moreover, interpretation of the federal statutes in the manner required by their historical setting does not, as Seacoast contends, render the "license" granted therein meaningless. Section 251, confirms that vessels duly enrolled, pursuant to 46 U.S.C. §§ 252 and 11, and no others, shall be deemed United States vessels, entitled to the "privileges of vessels employed in the coasting trade or fisheries." 46 U.S.C. § 251(a). Section 263 provides a "license for the fisheries" to fishing vessels enrolled. The purposes of the license would include: (1) conferring right to navigate freely in the waters of every state; (2) conferring the benefits attributable to American flag vessels while fishing in international waters, including the benefit of treaties to which the United States is a party; (3) conferring the right to fish within the exclusively federally controlled fishery zone (3-12 miles from the U.S. coast until March 1, 1977 and then 3-200 miles under the 1976 Fisheries Conservation and Management Act); and (4) establishing the character of the vessel as a fishing vessel, as opposed to a coastwise trade vessel, for various purposes, e.g., exemption from vessel inspection laws.

Thus, federal enrollment and licensing of fishing vessels

confers certain valuable rights and privileges, but does not confer the right to take fish from state territorial waters. Virginia's residency and citizenship licensing requirements under §§ 28.1-60 and 28.1-81.1 are, therefore, not preempted by federal licensing and enrollment.

C. There Is No Comprehensive Federal Legislative Scheme That Would Preempt Virginia Code Section 28.1-81.1.

Seacoast contends that various federal enactments, including the enrollment and licensing laws (46 U.S.C. § 11, 252), Sections 9 and 37 of the Shipping Act (46 U.S.C. § 808, 835), the Bartlett Act (16 U.S.C. § 1081) and the Fishery Conservation and Management Act of 1976 (16 U.S.C. §§ 1801-1882) constitute a comprehensive scheme of legislation regulating the "nationality of the owners of U.S. flag fishing vessels," thereby preempting Virginia Code § 28.1-81.1 which excludes foreign-controlled corporations from being licensed to take fish from Virginia waters.

This contention, however, runs afoul of the most basic principle of preemption enunciated by this Court in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960), *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Kelly* v. *Washington,* 302 U.S. 1 (1937), *Mintz* v. *Baldwin,* 289 U.S. 346 (1933), *Savage* v. *Jones,* 225 U.S. 501 (1912) and *Reid* v. *Colorado,* 187 U.S. 137 (1902), to the effect that:

> "Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid is not impaired." 313 U.S. 69, 75.

In short, the Virginia statute in question (Va. Code § 28.1-81.1) does not purport to deal with, nor does it, in fact, deal with the same matters which are the concerns of the array of federal statutes cited by Seacoast as preemptive. Virginia

Code § 28.1-81.1 deals with licensing to take fish in Virginia waters and makes ineligible for licenses foreign-controlled corporations. None of the federal enactments relied on as preemptive deals with the same subject.

Sections 252 and 11 of the Shipping Act (46 U.S.C. §§ 252, 11) establish the requirements for obtaining American flag status for vessels to be licensed (46 U.S.C. § 263) for the coastwise trade or fisheries. Seacoast has argued that the "license" provided for under 46 U.S.C. § 263 grants to its holder a right to fish in every state's waters, thus preempting Virginia's laws preventing non-resident and foreign-controlled corporations from fishing in Virginia. This contention we have shown to be erroneous (I. B). Now Seacoast argues that 46 U.S.C. §§ 252 and 11, which merely establish the requirements for enrollment or American flag status, a prerequisite for the license under 46 U.S.C. § 263, preempt the Virginia laws. The enrollment statutes (46 U.S.C. §§ 252, 11), insofar as fisheries are concerned, relate solely to the vessel itself, providing the requirements for obtaining the characterization as an American flag vessel. The reach of these laws, by their express terms, ends with the establishment of the vessel's American flag status. Sections 252 and 11 in no wise confer any authority to engage in fishing in state waters. Compliance with 46 U.S.C. §§ 252 and 11 merely enables a vessel owner to apply for a license under 46 U.S.C. § 263, which license itself we have shown, confers no right to fish in state waters. Thus, the enrollment requirements established under 46 U.S.C. §§ 252 and 11 clearly do not address the matter of taking fish from state waters, a matter left to the states, but instead relate solely to the documentation of vessels as American flag vessels.[1]

[1] We find great difficulty in understanding how the documentation laws do not, in fact, weigh heavily against Seacoast's theory of preemption. Pursuant to 46 U.S.C. §§ 252 and 11 vessels to be enrolled as

The enrollment laws, therefore, do not preempt Virginia Code § 28.1-81.1.

Sections 9 and 37 of the Shipping Act (46 U.S.C. §§ 808, 835) establish a requirement of federal approval of any transfer of United States enrolled and licensed vessels to foreign interests. The question of transferring United States vessels to foreign ownership under the Shipping Act (46 U.S.C. §§ 808, 835) has nothing to do with the right to take fish in Virginia waters governed by the state law in question here. Seacoast, nevertheless places great reliance upon the issuance of vessel transfer orders under Sections 9 and 37 of the Shipping Act. Hundreds of such transfers are approved annually, usually to allow American vessels to be sold to foreign owners for redesignation as foreign flag vessels. American flag fishing vessels sold to foreign controlled U.S. corporations that wish to retain such vessels in the American fisheries must also be approved. As administered, such transfers of fishing vessels are absolutely routine, usually without public hearings. From Fiscal 1971 through Fiscal 1976 the Maritime Administration of the Department of Commerce approved the sale of 132 fishing vessels from the

American flag vessels in the *coastwise trade* must be 75% owned by United States citizens. This requirement is made express by the Congress under 46 U.S.C. § 11. Yet 46 U.S.C. § 11 is silent regarding foreign ownership of corporations owning vessels enrolled as U.S. flag *fishing vessels*. Thus, while we contend that the matters dealt with under 46 U.S.C. §§ 252 and 11 are entirely different from the matter of taking of fish in state waters addressed by the Virginia laws, 46 U.S.C. §§ 252 and 11 are silent regarding foreign ownership of fishing vessels, thereby leaving the matter free of Congressional regulation. Preemption, therefore, cannot occur until Congress has acted to regulate foreign ownership of fishing vessels under 46 U.S.C. §§ 252 and 11. But in any event, even if 46 U.S.C. §§ 252 and 11 did address foreign ownership of corporations owning U.S. documented vessels, such laws would not preempt the Virginia law, dealing with licensing to take fish in state waters, a matter entirely separate from vessel documentation.

United States citizens to foreign interests wishing to retain the United States flag. No transfer requests were rejected. Except in one case involving the posting of a bond by owners of a tuna boat conditioned upon the vessel being used in compliance with U.S. law, no conditions were ever imposed on any such fishing vessel transfers.

On September 8, 1976 a hearing was conducted before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, of the Committee on Merchant Marine and Fisheries of the United States House of Representatives (hereinafter called the "Hearing"); it inquired into the existence and extent of Federal governmental controls affecting the entry of foreign controlled corporations into the American fisheries.[2] The Congressional hearings indicated that the Maritime Administration views the controls imposed by Sections 9 and 37 of the Shipping Act (16 U.S.C. §§ 808, 835) almost exclusively in a national defense and national security context.[3] The Maritime Administration indicated that applications for transfer of fishing vessels pursuant to Sections 808 and 835 were referred for comment to three other governmental agencies, which

[2] House of Representatives, Hearing Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, 94th Congress, "Two Hundred Mile Fisheries Zone and Joint Ventures," Committee Serial No. 94-44 (Sept. 8, 1976).

[3] See page 186 of the hearing report where Mr. Garske, representing the Maritime Administration, states the following: "May I say something else about the basic purpose as we understand it of these statutes, of sections 808 and 835? Basically, they were enacted during—before, during and after the First World War and were addressed to national security, national defense, the protection of the existing U.S. flag merchant marine, and essentially that is the way the Maritime Administration has looked at them. I just wanted to indicate that that has been viewed as the basic purpose—national defense and national security."

almost invariably did not render an objection to the transfer.[4]

In response to a request from the Subcommittee for a statement on policy regarding fishing vessel transfers, the Maritime Administration responded (hearing report, p. ~~90~~ 188) as follows:

> "Ordinarily any vessel under 3,000 gross tons will be approved for transfer without condition if it is not needed for reasons of national defense and the foreign buyer and country of registry are acceptable. 46 C.F.R. 221-Appendix. Essentially, all vessels typically considered to be fishing vessels are under 3,000 gross tons."

As to new vessels constructed in United States yards, there is a blanket waiver in effect, resulting in automatic approvals by the Maritime Administration. (hearing report, p. 93). Therefore, a Department of Commerce clearance to enable a non-citizen (within the definition of the Shipping Act) to acquire a U.S. flag vessel, whether an existing vessel from a U.S. citizen or a new vessel by construction in a U.S. yard, is obtainable with little case by case analysis. In all events, the transfer orders under 46 U.S.C. §§ 808, 835 merely authorize a change of vessel ownership, and do not grant an affirmative right to fish in state waters in contra-

[4] See pages 186-187 of the hearing report, where the following exchange is reported: "Mr. Mannina: What happens if one of those three agencies recommends that you not approve the transfer? What does the Maritime Administration do? Mr. Garske: Well, I might say that there have been very few cases where these agencies have not recommended approval, or at least have not given a 'no objection.' As a general proposition I think where there was some objection or some question, it was not an absolute type of thing. In other words, it was worked out in some way. If, however, as you pose the question, if there was a very definite unconditional objection, then Maritime—and I am really hypothesizing now, I don't know, we have had a case like this —but in any event— Mr. AuCoin: May I interrupt for a moment? Did I understand you to say there has never been a case of that kind? Mr. Garske: I don't know. Mr. AuCoin: You can't recall a case of that kind? Mr. Garske: If there has been, they are very few."

vention of state laws such as the two Virginia laws here in question.

Similarly, the provisions of the Bartlett Act, 16 U.S.C. § 1081, do not conflict in any manner with the Virginia statute. The Bartlett Act prohibits fishing by *foreign flag vessels* (vessels not enrolled and licensed under United States enrollment and licensing laws) inside twelve miles of the United States coasts. As we have previously explained more fully (Brief of Appellant, p. 13) Virginia Code § 28.1-81.1 is applied in this case to bar from Virginia waters Seacoast's *United States flag vessels*. Since the Bartlett Act clearly applies only to *foreign flag vessels* (See Brief of United States, pp. 22-23) and the Virginia statute applies here to *United States flag vessels* (enrolled and licensced) owned by Seacoast, there can be no conflict requiring a finding of preemption.

For the same reason, the Fishery Conservation and Management Act of 1976 (effective March 1, 1977) can have no preemptive effect upon Virginia Code § 28.1-81.1. Section 307 of that Act (16 U.S.C. § 1857), relied upon as preemptive, prohibits *foreign flag vessels* from fishing within the new 200 mile U.S. fishery zone. The federal Act, therefore, having application only to *foreign flag vessels* cannot conflict with the application here of Virginia Code § 28.1-81.1 to Seacoast's *United States flag vessels*. Preemption of Virginia Code § 28.1-81.1 is not, therefore, demanded. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960).

Accordingly, the various federal statutes which Seacoast contends establish a comprehensive scheme of regulation preempting Virginia Code § 28.1-81.1 deal with matters entirely apart from those regulated by the aforementioned Virginia provision. Virginia, by enactment of § 28.1-81.1, makes no attempt to control the nationality of owners of

vessels seeking federal enrollment and licensing (46 U.S.C. §§ 252, 11) nor do they seek to regulate transfer of United States vessels to foreign interests (46 U.S.C. §§ 808, 835). It is equally clear that Virginia Code § 28.1-81.1, making Seacoast ineligible to take fish in Virginia waters with *United States flag vessels*, in no way conflicts with the Bartlett Act or Section 307 of the Fishery Conservation and Management Act of 1976 which regulate only *foreign flag vessels*. Virginia Code § 28.1-81.1 is not, therefore, preempted by the federal statutes relied upon by Seacoast.

D. Virginia Code Section 28.1-81.1 Does Not Intrude Upon The Federal Authority In Foreign Affairs.

The suggestion by Seacoast that Virginia Code § 28.1-81.1, excluding foreign-controlled corporations from Virginia's fisheries, interferes with the United States' prosecution of foreign policy requires only brief comment.

It should be noted at the outset that the United States has in its Brief made no objection to the Virginia law in question based upon foreign policy considerations. If such an interest or policy of the United States was jeopardized by the law in question certainly the United States would forcefully assert its objection.

The authorities cited by Seacoast to support the contention that the Virginia law under consideration intrudes upon federal authority in foreign affairs are entirely inapplicable to the Virginia statute. Virginia Code § 28.1-81.1 does not require the "minute inquiries concerning the actual administration of foreign law," or inquiry into "the credibility of foreign diplomatic statements" found objectionable in *Zschernig* v. *Miller,* 389 U.S. 429 (1968). Nor does the Virginia law lend itself to controversy which would require the state courts to adjudge the nationalization orders of a

foreign state or interfere in United States recognition of any foreign nation, all of which was involved in *United States* v. *Pink,* 315 U.S. 203 (1942). Accordingly, the claim that Virginia Code § 28.1-81.1 intrudes upon the federal domain in foreign affairs is without factual foundation and lacks support of any comparable precedent.

Further, the Virginia statute under consideration in this case is premised upon the same experience and findings which underlie the Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801 et seq.)—that foreign fishing interests have contributed largely to the rapid depletion of American fishery stocks. (Brief of Appellant, pp. 24-25). The Virginia statute, therefore, is in harmony with current federal policy and law regarding access of foreign fishing interests to American fisheries.

II.

Virginia Code Section 28.1-60 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws. Virginia Code Section 28.1-60 Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Is Therefore Permissible Under The Fourteenth Amendment.

A. The Appellees Are Foreign-Controlled Corporations And As Such Are Not Entitled To Claim The Benefits Of The Equal Protection Clause Of The Fourteenth Amendment.

This Court has held that corporations formed by United States citizens are "persons" within the intendment of the Equal Protection Clause of the Fourteenth Amendment. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936), *Pembina Mining Co.* v. *Pennsylvania,* 125 U.S. 181, 189 (1888). But Seacoast has not cited and we are not aware of any instance wherein this Court has held that the protections of the Equal Protection Clause extended to corpora-

tions owned and controlled by non-resident aliens. Seacoast is wholly owned by Hanson Trust, Ltd. whose stockholders and directors are citizens of the United Kingdom, and therefore, is not in the same position as a corporation owned by United States citizens in asserting claims under the Fourteenth Amendment.

The rationale for application of equal protection guarantees to corporate entities formed by United States citizens was set forth in *Pembina Mining Co.* v. *Pennsylvania,* as follows:

> "Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name . . . ." 125 U.S. 181, 189.

The rationale underlying application of the equal protection guarantees to corporations owned by United States citizens is, apparently, that since the individual corporate owners are clearly protected by the Fourteenth Amendment, the entity representing their association for business purposes should also be protected. But with respect to corporations, such as Seacoast, owned by non-resident alien stockholders, that rationale does not apply. Non-resident aliens have never been afforded Fourteenth Amendment guarantees. Why, then, should corporate entities established and controlled by non-resident aliens be afforded such protections? There is, therefore, no basis upon which a foreign-owned corporation, such as Seacoast, can demand equal protection guarantees under the Fourteenth Amendment.

B. Virginia Code Section 28.1-60 Limiting The Taking Of Menhaden In The Chesapeake Bay To Resident Corporations Is Reasonably Related To Fisheries Conservation And Is Therefore Permissible Under The Fourteenth Amendment.

Even if Seacoast can demand the protections of the Equal Protection Clause, Section 28.1-60 does not contravene such constitutional guarantees.

Contrary to the view expressed by Seacoast, *Toomer* v. *Witsell,* 334 U.S. 385 (1948) is not dispositive or controlling authority in considering the constitutionality of Virginia Code § 28.1-60 under the Equal Protecton Clause of the Fourteenth Amendment. Valid fisheries conservation reasons for Virginia's residency requirement on licenses for taking Chesapeake Bay menhaden have been offered (Brief of Appellant, pp. 32-33) which are clearly distinguishable from those found insufficient in *Toomer.* (Brief of Appellant, pp. 33-34). In addition to promoting conservation of the fragile menhaden fishery, by facilitating enforcement of menhaden net size restrictions (Brief of Appellant, pp. 32-33), the Virginia residency law furthers enforcement of Virginia Code § 28.1-58, prohibiting menhaden fishers from taking more than one percent *food fish* in any menhaden catch. As with net size regulations, the *food fish* catch limitation of § 28.1-58 can be most effectively enforced at dockside. It cannot be disputed that the residency requirement would, therefore, facilitate conservation of edible fish as well as menhaden, since Virginia resident corporations land their catches in Virginia ports within the enforcement jurisdiction of the Virginia Marine Patrol. Non-resident fishers landing catches outside Virginia could escape effective enforcement.

Seacoast challenges the practical justifications offered in defense of the residency law, apparently calling for in depth

statistical evidence that the residency law, in fact, has promoted conservation. While it is submitted that, in fact, the statute does promote conservation, such proof of the statute's effect has never been the standard applied in reviewing state business and economic regulatory laws under the Equal Protection Clause. It has traditionally been sufficient, in justifying such laws, to offer a reasonable basis for the questioned statute which could have motivated the state legislature to enact the law. *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 471 (1970). The Virginia residency law, viewed in the context of related fisheries statutes (§§ 28.1-58 and 28.1-65), can be justified as reasonably related to fisheries conservation.

A second factor which distinguishes this case from *Toomer* is the substantial interest of Virginia in the Chesapeake Bay menhaden fishery contrasted with the, then, highly tenuous nature of South Carolina's interests in the costal shrimp fishery. It is apparent from the recent decisions of this Court reviewing state statutory classifications under the Equal Protection Clause that the final conclusion as to constitutionality depends largely upon a balancing of state interests promoted by the legislation against the interests of those claiming denial of equal protection. *Sosna* v. *Iowa,* 419 U.S. 393 (1975), *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), *Reed* v. *Reed,* 404 U.S. 71 (1971). In *Toomer* South Carolina's assertions of an ownership interest in the waters and fisheries resources of the three-mile coastal belt was effectively disregarded in reviewing the South Carolina statute as a result of the Court's holding the previous term in *United States* v. *California,* 332 U.S. 19 (1947). Having decided in *United States* v. *California* that the United States was the owner of the coastal waters of the United States and the resources therein, South Carolina's interests in those resources was severely diminished. In the present case, the Virginia

statute regulates the State's most valuable fishery, located within the Chesapeake Bay, an inland body of water, which has always been viewed as the subject of state ownership. Virginia's undisputed ownership of the Chesapeake Bay alone distinguishes *Toomer* and is the foundation of the substantial interests of Virginia in its regulatory scheme which were lacking as support for South Carolina's residency restrictions in *Toomer.*

Furthermore, the skepticism expressed in *Toomer* as to South Carolina's ownership of migratory shrimp, relied upon here by Seacoast as applicable to Chesapeake Bay menhaden, has been negated by the enactment of the Submerged Lands Act, 43 U.S.C. §§ 1301, *et seq.* That enactment conferred upon the states ownership and control of all fisheries resources located within state boundaries, irrespective of their sedentary or migratory nature. See 43 U.S.C. § 1301(e).

This Court has not held, as Seacoast implies by reference to *Missouri* v. *Holland,* 252 U.S. 416 (1920), that migratory fish and wildlife are not subject to state ownership. In *Missouri* v. *Holland* it was decided only that state ownership of migratory birds was not sufficient to give states *exclusive* regulatory authority under the Tenth Amendment so as to render unconstitutional a federal treaty regulating such birds. Thus, *Missouri* v. *Holland* does not preclude state ownership of migratory species, but instead merely confirms federal authority to regulate such species under its interstate commerce and treaty-making powers. Since in the present case no federal treaty or regulatory scheme is in conflict with the Virginia statute *Missouri* v. *Holland* is of little relevance. The Submerged Lands Act, however, is relevant and very clearly vests in the states ownership of the fisheries resources, including migratory species, located within their borders. 43 U.S.C. § 1301(e).

The interests Virginia seeks to preserve in its Chesapeake Bay menhaden fishery are, therefore, far more substantial in nature than the interests South Carolina could legitimately assert in respect to the coastal shrimp fishery in *Toomer*. Virginia's interests arise from ownership of a valuable resource, not mere physical proximity as was the case in *Toomer*. At the time *Toomer* was decided, after the holding in *United States* v. *California* and prior to the enactment of the Submerged Lands Act, the federal government could have asserted complete and exclusive authority over the coastal shrimp fishery. South Carolina residents, as well as residents from every other state, could have been denied access to the shrimp fishery by the United States under the holding in *United States* v. *California*. South Carolina's ability to assert any real vested interest in the value of the resources as a source of employment for its citizens, a food source, or a source of revenue was entirely dependent upon federal acquiescence. By contrast, Virginia's ownership of the Chesapeake Bay and the resources found therein gives rise to a true and substantial vested interest in the economic benefits derived from that resource.

Where a state seeks by its laws to regulate economic and business interests this Court has consistently found state laws valid against equal protection challenges where such laws may be justified by some reasonably conceived set of facts. *McGowan* v. *Maryland*, 366 U.S. 420 (1961). Virginia's residency requirement for the taking of menhaden in the Chesapeake Bay can be so justified (See Brief of Appellant, pp. 23-38).

Seacoast has expended great effort in suggesting alternative law enforcement and conservation measures which would avoid the residency requirement of Virginia Code § 28.1-60. But it is clear from numerous holdings of this Court that the Equal Protection Clause does not demand absolute equality, perfect uniformity or complete rather

than partial resolution of legitimate problems under state laws which regulate economic and business matters. As this Court pointedly noted in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970):

> "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70. 'A statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U.S. 420, 426."

We have asserted in the opining Brief, and still maintain, that Virginia's ownership of the Chesapeake Bay and its menhaden resource makes applicable this Court's holding in *McCready* v. *Virginia*, 94 U.S. 391 (1877), which upheld Virginia's residency requirement of the propagation and harvesting of oysters from Virginia tidewaters. The continued vitality of the ownership doctrine was highlighted in Mr. Justice Frankfurter's concurring opinion in *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

Apart from the holding in *McCready*, which created an exception to the Privileges and Immunities Clause based upon state ownership, Virginia's ownership of the Chesapeake Bay menhaden fishery clearly distinguishes this case from *Toomer* by virtue of Virginia's more substantial interests in the fishery regulated. In *Toomer*, perhaps as a result of the view that South Carolina's economic interests in the coastal shrimp fishery were tenuous after *U.S.* v. *California*,

the Court was apparently less inclined to afford the South Carolina statute the usual presumptions of reasonableness given statutes regulating economic and business matters under the Equal Protection Clause. The substantial economic interests Virginia has in respect to its Bay menhaden fishery demands that the state be afforded the latitude traditionally applied in judging state laws regulating substantial state economic interests. *McGowan* v. *Maryland*, 366 U.S. 420 (1961), *Dandridge* v. *Williams*, 397 U.S. 471 (1970). And in no other area of state regulation do the states require greater latitude than in the regulation of natural resources, requiring solutions to problems that are often unique and which involve fragile resources. *Truax* v. *Raich*, 239 U.S. 33 (1915), *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417-420 (1971). Accordingly, Virginia Code § 28.1-60, which has been shown to relate reasonably to a legitimate and substantial state interest in preservation of valuable and fragile natural resources, should be upheld against the equal protection challenges asserted here by Seacoast. The holding of the District Court as to § 28.1-60 should, therefore, be reversed.

III.

Virginia Code Section 28.1-81.1 Does Not Present An Issue Of Equal Protection Of The Laws And In Any Event The Statute Is A Valid Exercise Of State Police Power To Conserve Fisheries And Is Permissible Under the Fourteenth Amendment.

A. Virginia Code Section 28.1-81.1 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws.

For the same reasons set forth above in II. A, the Appellees cannot, as foreign-controlled corporations, assert claims based upon the Equal Protection Clause of the Fourteenth Amendment.

B. Virginia Code Section 28.1-81.1 Excluding Foreign-Controlled Corporations Does Not Establish A "Suspect Classification."

Seacoast is denied licenses for Virginia's coastal menhaden fishery under Virginia Code § 28.1-81.1 because it is a *foreign-controlled corporation*. Seacoast's claim that it has been denied equal protection of the law guaranteed by the Fourteenth Amendment, therefore, presents the question of whether the classification of Virginia Code § 28.1-81.1, barring *foreign-controlled corporations* from taking fish from Virginia waters, is a denial of equal protection of the law.

Seacoast asserts that the classification made by § 28.1-81.1 is a "suspect classification," based upon alienage, requiring "close judicial scrutiny" found applicable in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), *In re Griffiths*, 413 U.S. 717 (1973) and *Graham* v. *Richardson*, 403 U.S. 365 (1971). As we have noted more fully in the opening brief (Brief of Appellant, pp. 23-24) "close judicial scrutiny," requiring a showing of "compelling state interests" to justify alienage classifications, has been applied by this Court as the standard of review only when the statutory classification discriminates directly against *individual resident aliens. Sugarman, In re Griffiths, Graham, supra.* It is the individual resident alien who closely resembles the United States citizen under the Equal Protection Clause as a result of the presumptions which might reasonably flow from the immigration and naturalization processes.

In no instance of which we are aware has a statutory classification discriminating against *corporate* entities been treated as a "suspect classification." The presumptions which may logically emanate from federal immigration processes to establish the individual resident alien's nexus with the state and his community do not apply to *corporate*

entities which undergo no socialization process similar to immigration and naturalization.

Seacoast argues, relying upon *Jordan* v. *Tashiro*,[5] 278 U.S. 123 (1928), that the Virginia statute in effect discriminates against the individual aliens who ultimately own Seacoast and that, therefore, a suspect classification is involved. We hasten to point out, however, that the individuals ultimately owning Seacoast are themselves, *non-resident aliens*. The protections of the Fourteenth Amendment have never been extended to *non-resident aliens*. Thus, discrimination against non-resident aliens does not raise any Equal Protection issue, much less the issue of a "suspect classification."

C. Virginia Code Section 28.1-81.1 Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Therefore Is Permissible Under The Fourteenth Amendment.

If the exclusion of foreign-controlled corporations from taking fish in Virginia waters presents any equal protection issue at all, it must be resolved by application of usual equal protection standards requiring some reasonable justification. *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

The rationale underlying the enactment of Virginia Code § 28.1-81.1 has been set forth in full in the opening brief (Brief of Appellant, pp. 24-29). It was there noted that foreign fishing interests had, through their predatory fishing methods, drastically depleted American fishery stocks. Virginia has directly experienced the effects of such foreign fishing practices. (Brief of Appellant, p. 26). Contrary to

[5] *Jordan* v. *Tashiro* did not involve an equal protection issue at all but merely held that a treaty conferring benefits on *resident* Japanese aliens should be construed to benefit U.S. corporations formed by *resident* Japanese aliens.

the statement of Seacoast in its brief on the merits (p. 11), the Appellant, Douglas, in response to questions by counsel for Seacoast during depositions did not say that Section 28.1-81.1 was not designed to have a beneficial effect on the fisheries in Virginia or the United States, but said merely that § 28.1-81.1 was not designed to attack the United States problem (App. p. 59). The Commissioner in his depositions gave testimony as to the decline of certain fishery stocks, which had been important to the Virginia fishing industry, after foreign fishing had been directed against such stocks. He further stated that foreign fishing operators failed to abide by regulations imposed upon them by treaty or otherwise, e.g., "using gear that was improper in the area" or "being in an area when they are not supposed to be." (App. p. 51). He expressed concern that disregard for fishing regulations would accompany any foreign-controlled fishing operations into Virginia waters. Alluding to the means by which such foreign operators could enter Virginia waters under the pre-existing Virginia law, Commissioner Douglas stated:

> "There is the ability to buy U.S. vessels already enrolled in the fishery, such as several firms have already done. Mr. Willcox points out there is a procedure whereby they have to be approved somewhere at the Federal level. I think the problem that I personally would see is not vessels, but more of a philosophy and disregard for both law enforcement, which I am charged to enforce, and you must get some voluntary compliance in this game if you are going to effectively enforce your regulations. You have to have people out there who are not totally disregarding what you are trying to do, and if they have vested interest, if it is stock on which they have historically fished, they tend to have that interest, as opposed to the Soviets, or Poles, or foreign efforts that we have been talking about.

> So it seems to me that the problem that I would see, and that this bill, and new law would prevent, is it would prevent this kind of philosophy from coming into waters that have historically been managed by Virginians for Virginians, and have supported Virginians' fishing industry." (App. p. 69).

There can be no doubt that the states have legitimate interest in preserving fisheries stock. *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). That exclusion of foreign fishing interests from harvesting domestic fisheries bears a direct relationship to management and preservation of fisheries stocks cannot be disputed, particularly in light of the recent Congressional enactment of the Fishery Conservation and Management Act of 1976. The findings and policies set forth in the Act itself establish the relationship between conservation of fisheries and limitations on foreign fishing effort. [Brief of Appellant, Note 3, p. 25 and Publ. L. No. 94-265, 90 Stat. 331, § 2(a)]. Virginia Code § 28.1-81.1 is based upon the same rationale underlying the recent federal enactment. The federal Act, however, is directed only at *foreign flag vessels,* and does not concern itself with *United States flag vessels* operated by foreign-controlled U.S. corporations.

The suggestion by Seacoast that the rationale for exclusion of foreign-flag fishing vessels from United States coastal fisheries under the federal Act does not support the exclusion, under the Virginia Statute, of foreign-controlled fishing interests operating U.S. flag vessels does not bear close scrutiny. Virginia was concerned that an increasing number of vessels owned by foreign controlled U.S. corporations would commence fishing in its waters, to the detriment of its fishing resources, as the national 200 mile limit legislation was enacted. This concern was shown to be well-founded in the Hearing on September 8, 1976 before the House Sub-committee on Fisheries and Wildlife Conservation and the Environment, which opened with a statement by the Chairman of the committee confirming the foregoing in the following terms:

> "It appears that, pursuant to the Foreign Investments Study Act of 1974, the Bureau of Economic Analysis of the Department of Commerce conducted a study to determine the extent of foreign investment in this [American fishing] industry. It has been determined that the major factor contributing to the surge of direct foreign investment in U.S. commercial fisheries during the year 1974 was a threat of extension of the U.S. exclusive fisheries zone from 12 to 200 miles."

Foreign fishing interests might avoid exclusion from the new 200 mile U.S. Fishery zone by operating U.S. flag vessels. And as we demonstrated (Brief of Appellant, pp. 27-28) foreign interests can, with relative ease, gain such access to American fisheries, including state fisheries, through use of U.S. corporate shells. The Virginia statute is directed at blocking such efforts by foreign interests. The Virginia statute, therefore, has as its purpose protection of a permissible state interest and is reasonable and directly related to achieving that purpose; it does not, therefore, offend equal protection principles of the Fourteenth Amendment. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

Seacoast attempts to discredit the justification for the statute in question by suggesting that the law was framed to apply specifically to them for the benefit of their competitors. They allege that the Appellant conceded (Appellee brief, p. 11) that the Virginia statute was limited in its effect to Seacoast; rather he stated in answer to Seacoast's counsel questioning in depositions (App. p. 60) that "to the best of my knowledge, that is the only firm that has been affected at this time." In fact, however, the statute applies

beyond the menhaden fishery in which Seacoast is involved to all types of commercial fishing. It was supported, not merely by Virginia menhaden operators, but by all segments of Virginia's seafood industry. The law is designed to meet a general problem, however personally Seacoast may apply it to themselves. In cases involving a state's regulation of its economic resources, the usual equal protection standard is applied. As this Court stated in *Dandridge* v. *Williams:*

> "If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. *But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants* of welfare payments to the largest AFDC families.[16] For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488." 397 U.S. 471, 484 (1970). (Emphasis added).

Seacoast alleges that Virginia Code Section 28.1-81.1 sweeps too broadly and is not precisely drawn. In fact, the statute does not attempt to prohibit foreign investment in the Virginia fishing industry as such. It merely limits the amount of control that foreign owners can have with respect

to the *harvest* of fisheries stocks in Virginia waters. The actual definitions of controlling interest in the Virginia statute are taken from the Federal Shipping Act and modeled after the same technique used by the national government in safeguarding the coasting trade. The danger seen by the Virginia General Assembly related to its fisheries stocks, and Virginia Code Section 28.1-81.1 is specifically limited to the *taking of fish*. It in no way restricts foreign investment in shore facilities nor does it attempt to limit the passage of U.S. flag vessels controlled by foreign nationals through Virginia waters.

Accordingly, Virginia Code § 28.1-81.1 is reasonably related to a legitimate state interest in conserving fisheries resources from depletion by foreign fishing interests and is, therefore, permissible as an exercise of the State's police powers consistent with the Fourteenth Amendment.

IV.

Virginia Code Sections 28.1-60 And 28.1-81.1 Do Not Violate The Commerce Clause Since They Neither Regulate Nor Unduly Burden Interstate Commerce.

Virginia Code §§ 28.1-60 and 28.1-81.1 establish licensing requirements for the taking of fish within Virginia's territorial waters, an activity this Court has consistently viewed as *local* in nature, apart from the flow of interstate commerce, and unquestionably within the permissible ambit of state police powers. *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), *Toomer* v. *Witsell,* 334 U.S. 385 (1948). The focus of the questioned Virginia statutes being *local,* Seacoast's reliance upon *Pennsylvania* v. *West Virginia,* 226 U.S. 553 (1923), *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911), and *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928) is quite obviously misplaced. In each of the just-mentioned cases the state legislation found viola-

tive of the Commerce Clause directly prohibited interstate shipment or transportation of commercial commodities beyond the borders of the regulating state. Virginia Code §§ 28.1-60 and 28.1-81.1 relate only to the eligibility to take fish in Virginia waters and in no way, directly or indirectly, affect the free flow of fish, taken in Virginia, out of the state in interstate commerce. The laws in question here do not prohibit out of state transportation of fish (*Oklahoma* v. *Kansas Natural Gas Co., Penna.* v. *West Virginia*) nor do they require that fish taken in Virginia be processed in Virginia (*Foster-Fountain Packing Co.* v. *Haydel*).

Similarly, Seacoast's reliance upon *H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525 (1949) and *Baldwin* v. *Seelig,* 294 U.S. 511 (1935) is unwarranted. In both *Hood* v. *DuMond* and *Baldwin* v. *Seelig* the statute found invalid, while purporting to regulate only locally, had the necessary practical effect of impeding the otherwise established free flow of commerce. By contrast, the Virginia statutes under consideration here regulate the taking of fish, before they become articles of commerce, and in so doing do not obstruct any substantial or established interstate flow of fish or fish products into or out of Virginia.

Nippert v. *Richmond,* 327 U.S. 416 (1945) is relied upon by Seacoast as controlling, but that case provides no authority for invalidating the Virginia laws considered here. *Nippert* involved a local tax on solicitation of orders for goods to be shipped into Virginia in interstate commerce. The solicitation tax was viewed by this Court as an impediment to solicitation of orders by out-of-state vendors, thereby burdening, in fact, a substantial interstate flow of out-of-state goods into Virginia. In determining whether a law unduly burdens interstate commerce, however, this Court has always looked to the actual practice and established course of business in the particular industry involved. As

was noted in *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928):

> "In determining what is interstate commerce, courts look to practical considerations and the established course of business." 278 U.S. 10

Prior to enactment of Virginia Code § 28.1-81.1 Seacoast was eligible for licenses to take menhaden in Virginia's three-mile coastal waters. Yet Seacoast, in fact, engaged in little or no menhaden fishing in Virginia. (App. pp. 36-37). Thus, even if the movement of fishing vessels from one state to another for purposes of taking fish is viewed as commerce, though we firmly contend it is not, Virginia's laws which prevent Seacoast from taking her fish impose no restriction upon any established course of interstate trade or business. In *Nippert,* on the other hand, the practical effect of the tax upon interstate commerce was substantial, in view of the well established interstate business of itinerate salesmen and the interstate shipment of goods resulting from their solicitation.

We do not contend, as Seacoast implies, that the local nature of the activity regulated by the Virginia laws in question forecloses any inquiry into the validity of the laws under the Commerce Clause. But before laws regulating local activities can be found to violate the Commerce Clause it must be shown that such laws, *in fact, unduly burden interstate commerce. Nippert* v. *Richmond,* 327 U.S. 416 (1945). The Virginia laws under consideration do not, in fact, unduly burden any established interstate commerce. Even where state laws which regulate local matters do, in fact, affect interstate commerce, the fact that the law impacts commerce does not automatically invalidate it. *Parker* v. *Brown,* 317 U.S. 341 (1943). This Court held *Parker* v. *Brown:*

". . . When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. [citations omitted]

* * *

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *DiSanto* v. *Pennsylvania,* supra. cf *Wickard* v. *Filburn,* supra, not because they control interstate activities in such a manner as only to affect commerce rather than to command its operations. *But they are to be upheld because upon consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be a wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce* . . . ." (Emphasis added)

This view has been consistently applied in upholding state laws which regulate matters of vital local concern while impacting interstate commerce to a degree viewed as permissible under the Commerce Clause, in the absence of Congressional regulation, and taking into consideration the uniquely local nature of the problems addressed by the state legislation. *Minnesota Rate Cases,* 230 U.S. 352 (1913), *South Carolina Highway Dept.* v. *Barnwell Bros.,*

303 U.S. 177 (1938), *California* v. *Thompson,* 313 U.S. 109 (1941).

Seacoast has not specified, in fact, any impact upon interstate commerce resulting from the Virginia statutes. Where a state law regulates a local activity and does not affect interstate commerce it must be upheld against Commerce Clause objections. *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936). This, we submit, is the case here. There being no impact upon commerce as a result of Virginia's statutes, they must be upheld against Seacoast's Commerce Clause objections. And in any event, the uniqueness of the problems associated with management of local fisheries, each with its peculiar characteristics, demands wide latitude for state fisheries regulation where Congress has not acted and the impact upon commerce, if any, is insubstantial. *Minnesota Rate Cases,* 230 U.S. 352 (1913); *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938), *California* v. *Thompson,* 313 U.S. 109 (1941).

CONCLUSION

Historically, the states have, by their laws, regulated the fisheries within state territorial boundaries. Such fisheries regulation has always included state licensing statutes similar to Virginia Code §§ 28.1-60 and 28.1-81.1.

Federal enactments governing the enrollment and licensing of fishing vessels as United States vessels (46 U.S.C. §§ 251, 263) do not confer upon the owners of United States vessels the right to take fish from the waters of every state, thereby preempting the state license requirements. Accordingly, Virginia Code §§ 28.1-60 and 28.1-81.1 are not preempted by the federal vessel enrollment and licensing statutes.

Federal statutes which regulate the nationality of the owners of United States vessels (46 U.S.C. §§ 11, 252) do not confer the right to take fish in state territorial waters and, therefore, are not in conflict with and do not preempt Virginia Code § 28.1-81.1. The provisions of the Shipping Act governing transfer of United States vessels to foreign interest (46 U.S.C. §§ 808, 835) in no way conflict with or preempt Virginia Code § 28.1-81.1 licensing the taking of fish in Virginia territorial waters.

The Bartlett Act (16 U.S.C. § 1081) and the Fisheries Conservation and Management Act of 1976 (16 U.S.C. § 1801 et seq.) deal with fishing by foreign flag vessels, not United States vessels, and, therefore, cannot preempt Virginia Code § 28.1-81.1 in its application to the United States vessels of the Appellees in this case.

Nor does § 28.1-81.1, in any manner, intrude upon federal authority in foreign affairs.

Virginia Code § 28.1-60 limiting licensing for taking of Chesapeake Bay menhaden to Virginia resident corporations is reasonably related to the legitimate state purpose of conserving valuable fisheries and, is, therefore, permissible under traditional Fourteenth Amendment Equal Protection standards.

Virginia Code § 28.1-81.1 which excludes foreign-controlled corporations from eligibility for commercial fishing licenses is reasonably related to the legitimate state purpose of conserving valuable fisheries and, is, therefore, permissible under traditional Fourteenth Amendment Equal Protection standards.

Virginia Code §§ 28.1-60 and 28.1-81.1, regulating the local activity of taking fish in state territorial waters, do not regulate or unduly burden interstate commerce in contravention of Article I, § 8 of the Constitution.

The holding of the District Court, insofar as it holds Virginia Code § 28.1-81.1 is preempted by federal law and that Virginia Code §§ 28.1-60 and 28.1-81.1 are violative of the Fourteenth Amendment, should be reversed.

Respectfully submitted,

JAMES E. DOUGLAS, JR.

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
JAMES E. KULP
Deputy Attorneys General

JAMES E. MOORE
Assistant Attorney General
Supreme Court–State Library Building
1101 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, James E. Moore, Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for James E. Douglas, Jr., in the above-captioned matter, hereby certify that three (3) copies of this Reply Brief have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this ..... day of January, 1977, as follows:

Thomas H. Willcox, Jr., Esquire
Willcox, Savage, Lawrence, Dixon and Spindle
1800 Virginia National Bank Building
Norfolk, Virginia 23510

John J. Loflin, Jr., Esquire
Lord, Day and Lord
25 Broadway
New York, New York 10004

The Honorable Robert H. Bork
Solicitor General of the United States
Department of Justice
Tenth and Constitution Avenue
Washington, D. C. 20530

The Honorable Louis J. Lefkowitz
Attorney General of New York
State Capitol
Albany, New York 12224

The Honorable Richard W. Weir, Jr.
Attorney General of Delaware
Department of Justice
12th and Market Streets
Wilmington, Delaware 19801

The Honorable Francis B. Burch
Attorney General of Maryland
One South Calvert Street
Baltimore, Maryland 21202

The Honorable Francis G. Bellotti
Attorney General of Massachusetts
State House
Boston, Massachusetts 02133

The Honorable Joseph E. Brennan
Attorney General of Maine
State House
Augusta, Maine 04330

The Honorable David H. Souter
Attorney General of New Hampshire
State House Annex
Concord, New Hampshire 03301

The Honorable Julius C. Michaelson
Attorney General of Rhode Island
Providence County Courthouse
Providence, Rhode Island 02903

Ammon G. Dunton, Jr., Esquire
Dunton, Simmons and Dunton
White Stone, Virginia 22578

Attorneys for Amici Curiae

All persons required to be served have been served.

JAMES E. MOORE
Assistant Attorney General